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Notice of Rulemaking Hearing

Hearings will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-204. For questions and copies of the notice, contact the person listed below.

Agency/Board/Commission:	Board of Water Quality, Oil and Gas
Division:	Water Resources
Contact Person:	Jimmy Smith
Address:	William R. Snodgrass Tennessee Tower 312 Rosa L. Parks Avenue, 11th Floor Nashville, Tennessee 37243
Phone:	(615) 532-0648
Email:	Jimmy.R.Smith@tn.gov

Any Individuals with disabilities who wish to participate in these proceedings (to review these filings) and may require aid to facilitate such participation should contact the following at least 10 days prior to the hearing:

ADA Contact:	ADA Coordinator
Address:	William R. Snodgrass Tennessee Tower 312 Rosa L. Parks Avenue, 22nd Floor Nashville, Tennessee 37243
Phone:	1-866-253-5827 (toll free) or (615) 532-0200
Email:	Hearing impaired callers may use the TN Relay Service 1-800-848-0298
	Beverly.Evans@tn.gov

Hearing Location(s) (for additional locations, copy and paste table)

Address 1:	Multi Media Room, 3 rd Floor William R. Snodgrass Tennessee Tower		
Address 2:	312 Rosa L. Parks Avenue		
City:	Nashville, Tennessee		
Zip:	37243		
Hearing Date :	06/27/18		
Hearing Time:	2:00 p.m.	<input checked="" type="checkbox"/> X CST/CDT	<input type="checkbox"/> EST/EDT

Video Conferencing Locations

Address 1:	Conference Room Nashville Environmental Field Office		
Address 2:	711 R. S. Gass Blvd.		
City:	Nashville, Tennessee		
Zip:	37216		
Hearing Date :	06/27/18		
Hearing Time:	2:00 p.m.	<input checked="" type="checkbox"/> X CST/CDT	<input type="checkbox"/> EST/EDT

Address 1:	Conference Room Memphis Environmental Field Office		
Address 2:	8383 Wolf Lake Drive		
City:	Bartlett, Tennessee		
Zip:	38133-4119		
Hearing Date :	06/27/18		
Hearing Time:	2:00 p.m.	<input checked="" type="checkbox"/> CST/CDT	<input type="checkbox"/> EST/EDT

Address 1:	Conference Room Jackson Environmental Field Office		
Address 2:	1625 Hollywood Drive		
City:	Jackson, Tennessee		
Zip:	38305		
Hearing Date :	06/27/18		
Hearing Time:	2:00 p.m.	<input checked="" type="checkbox"/> CST/CDT	<input type="checkbox"/> EST/EDT

Address 1:	Conference Room Columbia Environmental Field Office		
Address 2:	1421 Hampshire Pike		
City:	Columbia, Tennessee		
Zip:	38401		
Hearing Date :	06/27/18		
Hearing Time:	2:00 p.m.	<input checked="" type="checkbox"/> CST/CDT	<input type="checkbox"/> EST/EDT

Address 1:	Conference Room Cookeville Environmental Field Office		
Address 2:	1221 South Willow Avenue		
City:	Cookeville, Tennessee		
Zip:	38506		
Hearing Date :	06/27/18		
Hearing Time:	2:00 p.m.	<input checked="" type="checkbox"/> CST/CDT	<input type="checkbox"/> EST/EDT

Address 1:	Conference Room Chattanooga Environmental Field Office		
Address 2:	1301 Riverfront Parkway, Suite 206		
City:	Chattanooga, Tennessee		
Zip:	37402		
Hearing Date :	06/27/18		
Hearing Time:	3:00 p.m.	<input type="checkbox"/> CST/CDT	<input checked="" type="checkbox"/> EST/EDT

Address 1:	Conference Room Knoxville Environmental Field Office		
Address 2:	3711 Middlebrook Pike		
City:	Knoxville, Tennessee		
Zip:	37921		
Hearing Date :	06/27/18		
Hearing Time:	3:00 p.m.	<input type="checkbox"/> CST/CDT	<input checked="" type="checkbox"/> EST/EDT

Address 1:	Conference Room Johnson City Environmental Field Office		
Address 2:	2305 Silverdale Drive		
City:	Johnson City, Tennessee		
Zip:	37601-2162		
Hearing Date :	06/27/18		
Hearing Time:	3:00 p.m.	<input type="checkbox"/> CST/CDT	<input checked="" type="checkbox"/> EST/EDT

Additional Hearing Information:

This proposed rulemaking would substantially revise Rule Chapter 0400-40-07, which governs aquatic resource alteration permits ("ARAPs"). ARAPs authorize habitat alterations and water withdrawals and, where required, serve as certifications of compliance with state water quality standards under Section 401 of the Clean Water Act.

The proposed revisions clarify that ARAPs are required only for alterations of streams and wetlands, and would remove all references to wet weather conveyances because these are governed by T.C.A. § 69-3-108(q).

This rulemaking introduces the new term "baseline conditions" to reflect actual pre-impact resource values. The rules require compensatory mitigation to ensure no overall net loss of resource values from baseline conditions. The new term is intended to ensure that this mitigation is limited to what is necessary to offset the harm actually caused by the permitted activity, and not to compensate for pre-existing degradation. This change would also ensure appropriate mitigation for impacts to high quality waters, including Exceptional Tennessee Waters.

The current ARAP rules require only that a permit applicant consider avoidance and minimization and submit an alternatives analysis. Proposed Rule 0400-40-07-.04(5)(b) would require implementation of any practicable alternatives that have less adverse impact on resource values, so long as this does not result in other adverse environmental consequences. This rule is comparable to the Corps of Engineers' requirement for Section 404 permits, which are the federal equivalent of ARAPs.

The amendments would change the permitting process to include a draft permit and rationale, consistent with other types of permits issued by the Division of Water Resources. This will enhance transparency and improve the public notice process. Currently, the Division publishes only a notice of a complete application, without a draft permit or an explanation of what it intends to do, leaving interested persons (including permit applicants) with little basis to submit meaningful comment. The amendments also conform the permit appeal process to T.C.A. § 69-3-105(i) by clarifying that third parties, not just permit applicants, may appeal permits if they meet specific conditions.

Proposed amendments to the mitigation rule, 0400-40-07-.04(7), retain substantial portions of the existing rule while clarifying the methodology to ensure no overall net loss of resource values from baseline conditions. This rule prioritizes mitigation as close to the impact site as practicable. The rule also clarifies that mitigation for impacts to Tennessee streams and wetlands must occur in Tennessee.

Finally, the revisions include administrative updates and clean-up edits, including elimination of definitions that are not used in the rules or in permits.

Question and Answer Session

The Department is offering, in the main hearing location and by Video Conference, a Question and Answer session on these draft rules starting at 1:00 p.m. CDT or 2:00 p.m. EDT.

The "Draft" rules may be accessed for review using <http://tn.gov/environment/topic/ppo-water>.

Draft copies are also available for review at the following address:

Tennessee Department of Environment and Conservation
Division of Water Resources
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 11th Floor
Nashville, Tennessee 37243
(615) 532-0159

Office hours are from 8:00 AM to 4:30 PM, Monday through Friday (excluding holidays).

Oral or written comments are invited at the hearing. In addition, written comments may be submitted prior to or after the public hearing to: Division of Water Resources; Tennessee Department of Environment and Conservation; Attention: Jimmy R. Smith; William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Avenue, 11th Floor, Nashville, Tennessee 37243; telephone (615)532-0648 or FAX (615) 532-0686. However, such written comments must be received by the Division by 4:30 PM CDT, July 9, 2018, in order to ensure consideration. For further information, contact Jimmy R. Smith at the above address or telephone number.

Revision Type (check all that apply):

☒ Amendment
☐ New
☐ Repeal

Rule(s) (ALL chapters and rules contained in filing must be listed. If needed, copy and paste additional tables to accommodate more than one chapter. Please enter only **ONE** Rule Number/Rule Title per row.)

Chapter Number	Chapter Title
0400-40-07	Aquatic Resource Alteration
Rule Number	Rule Title
0400-40-07-.01	General
0400-40-07-.02	Exemptions
0400-40-07-.03	Definitions
0400-40-07-.04	Permits

Chapter 0400-40-07
Aquatic Resource Alteration

Amendments

Rule 0400-40-07-.01 General is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.01 General

- (1) These rules are promulgated to prevent the future pollution of state waters and to plan for the future use of such waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters, T.C.A. § 69-3-102(b). Persons who wish to conduct an activity that may impact a stream or wetland shall consider avoidance and minimization of such impacts. If impacts to a stream or wetland will result in an appreciable permanent loss of resource values, mitigation as set forth in paragraph (7) of Rule 0400-40-07-.04 must be provided to ensure no overall net loss of resource values.
- (2) Section 401 of the Federal Water Pollution Control Act or Clean Water Act, 33 U.S.C. § 1341, provides that an applicant for a federal license or permit for a discharge into the waters of the United States must provide the federal licensing or permitting agency a certification from the State in which the discharge originates or will originate, and that any such discharge will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of that Act.
- (3) Additionally, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-108(b)(1), provides that it is unlawful for any person, except in accordance with the conditions of a valid permit, to carry out any activity which results in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the State, including wetlands. These activities include, but are not limited to: the discharge of dredge or fill material, dredging, stream channel modifications, water withdrawals, wetlands alterations including drainage, and other construction activities which result in the alteration of the waters of the State. State permits for these activities are Aquatic Resource Alteration Permits, which also serve as § 401 certifications where required. Alterations of wet weather conveyances are governed by T.C.A. § 69-3-108(q).
- (4) This Chapter prescribes the procedures applicable to aquatic resource alteration permits, in addition to the general requirements and procedures of Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation, and the Tennessee Water Quality Control Act of 1977. Permits issued pursuant to this chapter do not authorize activities that require a National Pollutant Discharge Elimination System (NPDES) permit, a state operating permit, or an underground injection control permit.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

Paragraphs (3) and (4) of Rule 0400-40-07-.02 Exemptions are amended by deleting them in their entirety and substituting instead the following:

- (3) The Department of Agriculture provides guidance for development of best management practices (BMPs) for agriculture and forestry. One of the primary goals of these BMPs is the prevention of soil erosion and discharge of silt and sedimentation to streams. These BMPs should be followed. If silvicultural activities have polluted waters of the state as a result of a failure to use BMPs, the Commissioner is authorized to issue a stop work order under T.C.A. § 69-3-133.
- (4) Existing water withdrawals on July 25, 2000 which do not adversely alter or affect the classified use of the source stream are not subject to these requirements.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

Rule 0400-40-07-.03 Definitions is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.03 Definitions

As used in this chapter and in any ARAP issued pursuant to this chapter, the following terms have these meanings:

- (1) "Act" means The Tennessee Water Quality Control Act of 1977, as amended, T.C.A. §§ 69-3-101 et seq.
- (2) "Activity" means any and all work or acts associated with the performance, or carrying out of a project or a plan, or construction of a structure.
- (3) "Aquatic Resource Alteration Permit" or "ARAP" means a permit issued pursuant to T.C.A. § 69-3-108 of the Act, which authorizes the alteration of properties of waters of the state that result from activities other than discharges of wastewater through a pipe, ditch or other conveyance.
- (4) "Baseline Conditions" means the biological, chemical, bacteriological, radiological, and physical conditions of a stream or wetland at the time the project is proposed as measured by a quantitative assessment tool or other defensible scientific method as approved or determined by the Division.
- (5) "Best Management Practices" or "BMPs" means a schedule of activities, prohibition of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the State. BMP's include methods, measures, practices, and design and performance standards.
- (6) "Certification" means an Aquatic Resource Alteration Permit under the Act, when required by § 401 of the Federal Water Pollution Control Act, which certifies, either unconditionally or through imposition of terms under which the activity must be carried out, that the activity will comply with applicable provisions of §§ 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act and Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation and the Act.
- (7) "Channelization" means the alteration of stream channels including but not limited to straightening, widening, or enlarging.
- (8) "Constructed Wetland" means intentionally designed, built and operated on previously nonwetland sites for the primary purpose of wastewater treatment or stormwater retention; such wetlands are not created to provide mitigation for adverse impacts or other wetlands.
- (9) "Cumulative Impacts" means the impact on resource values which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.
- (10) "Debris" means woody materials, trash, flotsam, dislodged vegetation, and other potentially mobile materials which may, when located within a stream channel, contribute to flow blockage. This does not include gravel, sand, soil or its constituents such as silt, clay or other sediments.
- (11) "Ditch" means a man-made excavation for the purpose of conveying water. Ditches do not include streams, modified streams or canals.
- (12) "Division" means the Division of Water Resources within the Tennessee Department of Environment and Conservation.
- (13) "Dredging" (sand and gravel dredging) means the removal of sand, gravel and similar sediments or deposits from a stream, river, or lake bed or wetland by any method.
- (14) "Emergency" means a situation where life, public health, the environment, or substantive improvements to real property is in immediate danger.
- (15) "Erosion" means the process by which the land surface is worn away by the action of water, wind, gravity, chemicals, or a combination thereof.
- (16) "General Permit" means a permit issued under the Act and this rule authorizing an alteration to state

waters within the state for a specified category of activities that are substantially similar in nature.

- (17) "HUC" means the hydrologic unit code assigned by the United States Geological Survey.
- (18) "Individual Permit" means a permit issued by the Division to a specified person to conduct specified activities at a specified location. This type of permit does not authorize an activity by a class of persons or the public in general.
- (19) "Interflow" means the runoff infiltrating into the surface soil and moving toward streams as shallow, perched water above the main ground water level.
- (20) "In the Dry" means in such a manner that no equipment or dredged material is in contact with the stream or wetland and that the soil water boundary is not disturbed by equipment or that no infiltration is pumped to the stream from the dredge site.
- (21) "Minimal Impacts" means an activity for which the scope is very limited in area, the impact is very short in duration, and has no appreciable impact to waters just downstream of the location of the activity.
- (22) "Mitigation" means the restoration, creation, enhancement, and/or preservation of aquatic resources to compensate for unavoidable impacts as provided by paragraph (7) of Rule 0400-40-07-.04.
- (23) "Practicable alternative" is an alternative that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.
- (24) "Resource Values" are the benefits provided by the water resource that help maintain classified uses. These benefits may include, but are not limited to, the ability of the water resource to:
 - (a) filter, settle and/or eliminate pollutants;
 - (b) prevent the entry of pollutants into downstream waters;
 - (c) assist in flood prevention;
 - (d) provide habitat for fish, aquatic life, and wildlife;
 - (e) provide drinking water for wildlife and livestock;
 - (f) provide and support recreational and navigational uses; and
 - (g) provide both safe quality and adequate quantity of drinking water.
- (25) "Sediment" means soil or its constituents that has been deposited in water, is in suspension in water, is being transported, or has otherwise been removed or disturbed from its site of origin.
- (26) "Sedimentation or Siltation" means the process by which sediment is deposited in or by the waters of the State.
- (27) "Stabilize" means the proper placing, grading, and/or covering of soil, rock, or earth to insure their resistance to erosion, sliding or other movement.
- (28) "Stream" means a surface water that is not a wet weather conveyance. For purposes of this chapter, and permits issued pursuant to this chapter, a wetland is not a stream. See definition of wetland.
- (29) "Structure" means any building, pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, mooring structure, moored floating vessel, piling, aid to navigation, bridge, culvert or any other obstacle or obstruction.
- (30) "Wetland" means an area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Terminology not specifically defined herein shall be defined in accordance with the Act and the rules adopted thereunder.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

Rule 0400-40-07-.04 Permits is amended by deleting it in its entirety and substituting instead the following:

0400-40-07-.04 Permits

(1) Application for a Permit.

Any person who plans to engage in any of the activities outlined in T.C.A. § 69-3-108 must obtain a permit from the Commissioner to lawfully engage in such activity. When a § 401 certification is required, the ARAP also serves as the § 401 certification. There are two (2) types of ARAPs: Individual Permits and General Permits. There are several types of General Permits: (1) a General Permit that authorizes the implementation of the activity in accordance with all the terms and conditions of the General Permit without prior notice and approval from the Commissioner; (2) a General Permit which requires the applicant notify TDEC of the planned activity prior to implementing the activity in accordance with the terms and conditions of the General Permit; and (3) a General Permit that requires the applicant to notify the Commissioner of the planned activity and receive a notice of coverage from the Commissioner prior to implementing the activity in accordance with the terms and conditions of the General Permit. ARAP applications shall be submitted on forms approved by the Commissioner, and include all of the information requested therein. Certain of the General Permits authorize an activity that is authorized by a Nationwide Permit of the U.S. Corps of Engineers and therefore serve as a § 401 Certification. Persons need not file an application with the Commissioner if they are conducting an activity pursuant to a General Permit that does not require notice or approval, but must implement the planned activity in accordance with the terms and conditions of the General Permit. Persons who desire to implement an activity pursuant to a General Permit which requires notice, or notice and prior approval, must submit the necessary documentation required by the General Permit prior to implementing the planned activity in accordance with the terms and conditions of the General Permit. A person must file an application for an Individual Permit or for a § 401 Water Quality Certification with the Division, in accordance with paragraphs (3) and (5) of this rule, to implement any activity requiring an ARAP that is not authorized by a General Permit.

(2) General Permits.

The Commissioner may issue General Permits to authorize alterations to state waters for specific categories of activities that are substantially similar in nature within the state or other specified geographical areas. General Permits for habitat alterations may be issued only for activities that do not result in an appreciable permanent loss of resource values. General Permits may be issued for water withdrawals that cause no more than de minimis degradation. When the Commissioner determines that a category or activity is suitable for coverage by a General Permit, or that substantive modification of existing General Permits is consistent with T.C.A. § 69-3-108, the Commissioner will provide notice of, and conduct a minimum of, one public hearing. The public notice will contain the relevant information, as set forth in subparagraph (4)(c) of this rule and will be published along with a copy of the draft General Permit and a rationale explaining the basis for the permit. The Division will distribute the public notice to interested persons who have requested the Division notify them of ARAP applications and by posting on the TDEC Tennessee Department of Environment and Conservation's (TDEC) website. Interested persons may submit written comments on the draft General Permit within thirty (30) days of the public notice or such greater period as the Commissioner allows. All written comments submitted shall be retained and considered in the final determination to issue a General Permit. The procedures for obtaining coverage under a General Permit shall be specified in the General Permit.

(3) Section 401 Water Quality Certification.

An applicant for a federal license or permit to conduct an activity which may result in a discharge to the navigable waters must first obtain a § 401 certification from the Division. If the proposed activity requires an ARAP, that permit serves as the § 401 certification and is subject to the application and public notice procedures for obtaining ARAP coverage established by this chapter. Coverage under a General Permit, obtained either through a notice of coverage or automatic coverage under a General Permit for which no prior notice to the Division is required, constitutes a § 401 certification. If the proposed activity does not

require an ARAP, the applicant for a federal license or permit may obtain a § 401 certification by submitting a copy of the federal application to the Division and a request for a § 401 certification.

(4) Public Notice and Participation.

- (a) An ARAP Individual Permit or a § 401 Certification requires the issuance of public notice seeking public participation and comment on the planned activity. However, public notice is not required for an activity authorized by General Permit because public notice is provided pursuant to paragraph (2) of this rule. Each completed application shall be subject to the public notice and participation requirements of subparagraph (b) of this paragraph with the following exceptions:

1. § 401 Certification.

The Division's procedure for issuing public notice for certification of an application for a federal license or permit pursuant to § 401 of the Clean Water Act for an activity that does not require an ARAP shall be a public notice issued by the Division. Such notice will describe the activity and advise the public of the scope of certification, their rights to comment on the proposed activity, and to request a public hearing. The notice will also inform the public to whom they should send their requests and comments.

2. Minimal impact activities.

For activities that are projected to have only minimal impacts to streams or wetlands, which can be readily addressed, the Commissioner may utilize a twenty (20) day public notice period.

3. When the Commissioner determines that a proposed permit modification or renewal will not materially change water quality aspects of the project, or will result in an improvement of water quality, as compared to the originally permitted activity, a permit may be modified or renewed without public notice.

4. Where the Commissioner determines an emergency situation exists, a permit for remedial action may be issued without prior public notice and participation. The emergency permit shall be advertised by public notice, however, no later than twenty (20) days after issuance. This permit shall be subject to all other provisions of subparagraph (b) of this paragraph. The remedial actions allowed shall be limited to those necessary to remedy the emergency.

- (b) Upon receipt of a completed ARAP application, the Commissioner will review and evaluate the proposed activity or project to make a determination whether to issue an Individual Permit, as described in paragraph (5) of this rule. In order to inform interested and potentially interested persons of the proposed activity, a public notice seeking public participation and comment on the activity will be given, along with a draft permit and a rationale explaining the basis for the draft permit, including the basis for determining whether a proposed activity will result in an appreciable permanent loss of resource values. Except as provided in subparagraph (5)(c) of this rule, if an activity will result in an appreciable permanent loss of resource values, the draft permit shall include requirements for mitigation and the rationale shall explain the basis for determining that the mitigation is sufficient to result in no overall net loss of resource values from baseline conditions.

- (c) The public notice will include the following information:

1. Name, address, and telephone number of the applicant;
2. Name, address, telephone number, and electronic mail address of the Division contact person;
3. A brief description of the proposed activity;
4. The location of the state waters impacted by the proposed activity;

5. The Division website at which additional information about the permit application can be found;
 6. The procedure to submit comments on the proposed activity;
 7. The procedure for requesting a public hearing; and
 8. A brief description of the procedure for the Commissioner to make a final determination to issue a permit.
- (d) The approved public notice shall be distributed to interested persons and shall be circulated within the geographical area of the proposed activity as follows:
1. The Division will distribute the approved public notice to interested persons who have requested the Division notify them of ARAP applications and by posting on the TDEC website.
 2. The Applicant shall post a sign within view of a public road in the vicinity of the proposed project site as specified by the Division. The sign shall contain those provisions as specified by the Division. The sign shall be of such size that is readily visible from the public road. Also, the sign shall be maintained for at least thirty (30) days following distribution of the approved public notice.
 3. The applicant shall provide certification to the Division of compliance with part 2 of this subparagraph.
- (e) A copy of the public notice shall be sent to any person who specifically requests one. Interested persons may submit written comments on the proposed activity within thirty (30) days of public notice or such greater period as the Commissioner allows. All written comments submitted shall be retained and considered in the final determination to issue a permit.
- (f) Interested persons, including the applicant, may request, in writing, that the Commissioner hold a public hearing on any application. Said request from interested persons must be filed as soon as possible, but no later than the end of the period allowed for public comment, and must indicate the interest of the party filing it, must concisely state the water quality issues being raised, and the reasons why a hearing is warranted. If there are water quality issues and significant public interest in having a hearing, the Commissioner shall hold one in the geographical area of the proposed activity. No less than thirty (30) days in advance of the hearing, public notice of it shall be circulated at least as widely as was notice of the application. The Commissioner will distribute notice of the public hearing as set forth in part (d)1 of this paragraph, and by publishing in a local newspaper. The notice shall cite the date, time and place of the public hearing, a statement of the issues raised by the person requesting the hearing, and the purpose of the public hearing.
- (5) Individual Permits.
- (a) Persons who plan to engage in any activity that requires an Aquatic Resource Alteration Permit which is not governed by a General Permit or a § 401 Water Quality Certification, must submit an application to the Commissioner for review and approval prior to implementing the planned activity. The Commissioner will review a completed application and make a determination whether to issue an Individual Permit. The application must describe the proposed activity and include all the necessary technical information for the Commissioner to make a determination.
 - (b) The applicant shall submit an alternatives analysis evaluating a range of potentially practicable alternatives to minimize the loss of resource values consistent with the overall purpose of the proposed activity. For public road projects commissioned by a state, county, or local government, this alternatives analysis does not need to include alternative locations. No Individual Permit shall be granted if there is a practicable alternative to the proposed activity that would have less adverse impact on resource values, so long as the alternative does not have other significant adverse environmental consequences.
 - (c) The applicant shall describe the proposed project including the use of technical terms defined in

Rule 0400-40-07-.03 where relevant. The sketch or plans and specifications submitted with the application shall describe the method for implementation of the planned activity. Where the proposed activity would result in an appreciable permanent loss of resource value, the applicant must propose mitigation sufficient to result in no overall net loss of state water resource values. In unusual circumstances, including but not limited to emergency permits, a state, county, or local government applicant may propose a specific mitigation plan after an Individual Permit has been issued, provided that the permit shall specify the amount of mitigation required and an implementation timeline.

- (d) An Individual Permit is required for water withdrawals which will or will likely result in alteration of the properties of the source stream and will result in more than de minimis degradation.
 - 1. Persons proposing to withdraw water from waters of the state in a manner which will or will likely result in an alteration of the properties of the source stream, shall file an application with the Division which includes the following minimum information:
 - (i) proposed withdrawal rates and volumes;
 - (ii) proposed withdrawal schedule; and
 - (iii) flow data of the source stream (if free flowing).
 - 2. Where a permit for water withdrawal is required, the Commissioner shall establish permit conditions which are protective of the source stream's resource value. These conditions may include flow levels below which no withdrawal may occur. The Commissioner may also establish a maximum withdrawal rate in order to maintain the natural flow fluctuation characteristics of the source stream. Monitoring and reporting requirements may be established to ensure and document compliance with permit conditions.

(6) Permit Evaluation Criteria.

- (a) Some activities may not be entitled to a permit. When a permit is granted, it shall require compliance with all provisions of the Act, the regulations adopted pursuant to the Act, and any special terms or conditions the Commissioner determines are necessary to fulfill the purposes or enforce the provisions of the Act.
- (b) A permit may be modified, suspended, or revoked for cause by the Commissioner upon such notice to the permittee as required by law. Cause shall include, but not be limited to the following:
 - 1. violation of any terms or conditions of the permit;
 - 2. obtaining a permit by misrepresentation or failure to disclose fully all relevant facts;
 - 3. causing a condition of pollution;
 - 4. violation(s) of the Act or other environmental statutes;
 - 5. a change in the Act or regulations that substantively impacts the content of the permit;
 - 6. a change in the Federal Clean Water Act that substantively impacts the content of the permit; and
 - 7. a significant change of the physical condition(s) of the site or the waters.
- (c) No activity may be authorized by the Commissioner unless any appreciable permanent loss of resource values associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource values from baseline conditions. In a situation in which an applicant proposes mitigation that would not result in no overall net loss, the Commissioner shall not issue the permit unless the applicant redesigns the project to avoid impacts, minimize them, or provide mitigation as provided in paragraph (7) of this rule so that the redesigned project would result in no net loss of resource value. In making a decision on a permit application, the

Commissioner shall determine the loss of resource values from baseline conditions associated with a proposed impact and the increase in resource values of any proposed mitigation and shall consider the following factors:

1. direct loss of stream length, waters, or wetland area due to the proposed activity;
2. direct loss of in-stream or wetland habitat due to the proposed activity;
3. impairment of stream channel stability due to the proposed activity;
4. diminishment in species composition in any stream or wetland due to the proposed activity;
5. direct loss of stream canopy due to the proposed activity;
6. whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource;
7. conversion of unique or high quality waters as established in Rule 0400-40-03-.06 to more common systems;
8. hydrologic modifications resulting from the proposed activity;
9. the adequacy and viability of any proposed mitigation including, but not limited to, quantity, quality, likelihood of long term protection, and the inclusion of riparian buffers;
10. quality of stream or wetland proposed to be impacted;
11. whether the stream or wetland is listed on the § 303(d) list; whether the proposed activity is located in a component of the National Wild and Scenic River System, a State Scenic River, waters designated as Outstanding National Resource Waters, or waters identified as high quality waters as defined in Rule 0400-40-03-.06, known as Tier II waters; whether the activity is located in a waterway which has been identified by the Division as having contaminated sediments; and whether the activity will adversely affect species formally listed in State and Federal lists of threatened or endangered species; and
12. any other factors relevant under the Act.

- (d) All permits which require mitigation of impacts shall contain conditions requiring that the mitigation is performed properly, performed in a timely manner and is adequately maintained.

(7) Mitigation.

- (a) If an applicant proposes an activity in stream or wetland that would result in an appreciable permanent loss of resource values, the applicant must provide mitigation which results in no overall net loss of resource values from baseline conditions.
1. The applicant shall provide the Division with a mitigation plan, including a time schedule for completion of all mitigation measures, for approval. To the extent practicable, the applicant shall complete any required mitigation, excluding monitoring, prior to, or simultaneous with, any authorized impacts.
 2. Acceptable mitigation mechanisms include any combination of permittee-responsible mitigation, in-lieu fee programs, mitigation banks, or other mechanisms that are reasonably assured to result in no overall net loss of resource values from baseline conditions.
 3. Acceptable mitigation methods are prioritized in the following order: restoration, enhancement, preservation, creation, or any other measures that are reasonably assured to result in no net loss of resource values from baseline conditions.

4. The Division will evaluate resource value compensation through the use of an appropriate quantitative assessment or other defensible scientific method, and where applicable will account for temporal loss of resource values. The Division will use a watershed prioritization approach to evaluate proposed mitigation sites. Mitigation should occur as close to the impact location as practicable, prioritized as follows:
 - (i) projects providing an increase in resource values to degraded streams or wetlands on site or within the immediate impact area;
 - (ii) projects providing an increase in resource values to degraded streams or wetlands within the HUC-12 in which the impact is located;
 - (iii) projects providing an increase in resource values to degraded streams or wetlands within the HUC-8 in which the impact is located;
 - (iv) projects providing an increase in resource values to degraded streams or wetlands outside the HUC-8 in which the impact is located; or
 - (v) A combination of any of the above activities.

Where appropriate, the Division may apply a multiplier based on items (i) through (v) of this part.

5. All mitigation plans shall include a monitoring and reporting program to document timely achievement of successful mitigation and remedial actions to correct any deficiency.
6. Mitigation for impacts to Tennessee streams and wetlands shall occur in Tennessee.

(b) Mitigation of streams

Mitigation for impacts to streams shall be developed in accordance with the most recent Stream Mitigation Guidelines developed by the Division or other defensible scientific methodology.

(c) Mitigation of Wetlands.

1. Prioritization of mitigation site selection for wetland impacts may also be based on U.S. EPA Level III ecoregions.
2. The ratio of acres required for wetland mitigation should not be less than 2:1 for wetland restoration; 4:1 for wetland creation and enhancement; and 10:1 for wetland preservation. Applicants may propose and utilize, subject to the Division's approval, best professional judgment ratios. The best professional judgment ratios shall be based on the resource values and functions of the affected wetland, anticipated resource value of the proposed mitigation, temporal loss, and the likelihood of success of the proposed mitigation.

(8) Duration and Renewal of Permits.

- (a) Each permit issued shall have a fixed term not to exceed five (5) years.
- (b) Renewal of permits is not required for one-time alterations such as construction, as long as the alterations, mitigation, and monitoring are completed within the time limit established by permit. Any permittee that has not completed the alteration authorized by the permit, or the mitigation and monitoring required by the permit, must apply for renewal at least ninety (90) days prior to the expiration date.
- (c) For on-going alterations, such as water withdrawals, any permittee who wishes to continue the permitted activity after the expiration date of the permit must make application for renewal at least ninety (90) days prior to its expiration date. If an application for permit renewal does not fall within subparagraph (4)(a)3 of this rule, the Commissioner shall follow the procedures for public notice and participation detailed in paragraph (4) of this rule, regarding each application for renewal of

the permit.

(9) Permit Appeals.

- (a) Permittees, applicants for permits, and aggrieved persons meeting the criteria of subparagraph (c) of this rule who disagree with the denial, issuance, terms, or conditions of a permit are entitled to review of the Commissioner's decision by the Board of Water Quality, Oil and Gas pursuant to T.C.A. § 69-3-105(i) and § 69-3-110.
- (b) For permit modifications only those terms that were the subject of the modification may be appealed.
- (c) To be entitled to a review of the Commissioner's permit decision, aggrieved persons shall:
 - 1. have submitted a written comment during the public comment period on the permit;
 - 2. have engaged in other direct communication with the Division regarding the proposed permit action during the public comment period;
 - 3. given testimony at a formal public hearing on the permit; or
 - 4. attended a public hearing as evidenced by completion of a Department of Environment and Conservation Record of Attendance Card or other method as determined by the Division.
- (d) The basis for the appeal for aggrieved persons may only include issues which:
 - 1. were provided to the Commissioner in writing during the public comment period;
 - 2. were provided in testimony at a formal public hearing on the permit; or
 - 3. arise from any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment.
- (e) All petitions for permit appeals shall be filed with the Board of Water Quality, Oil, and Gas within 30 days after the date that public notice of the permit issuance, denial, or modification is given by way of distribution of the notice to persons who meet the criteria of paragraph (3) of this rule.
- (f) Any action taken by the Commissioner regarding a permit remains in effect unless and until an order of the Board of Water Quality, Oil and Gas or a reviewing court becomes final.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

I certify that the information included in this filing is an accurate and complete representation of the intent and scope of rulemaking proposed by the agency.



Date: May 2, 2018

Signature: _____

Name of Officer: Jennifer Dodd

Title of Officer: Director of the Division of Water Resources

Subscribed and sworn to before me on: _____

Notary Public Signature: _____

My commission expires on: _____

Department of State Use Only

Filed with the Department of State on: _____

Tre Hargett
Secretary of State